Public Charge Grounds of Inadmissibility and Deportability

I. Intro/History of the provisions

A. The public charge grounds of inadmissibility and deportability have been a part of immigration law since the turn of the Twentieth Century

1. The country's first immigration law, enacted in 1882, excluded aliens who were deemed "likely to become a public charge" after they came to the United States. Act of Aug. 3, 1882, 22 Stat. 58
2. In 1903, Congress made aliens who had migrated to the US deportable if they became a public charge within 2 years after entry (later increased to 5 years). Act of Mar. 3, 1903, 32 Stat. 1213

B. INA Section 212(a)(4) – Any alien who, in the opinion of the consular officer at the time of the application for a visa, or in the opinion of the AG at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible

C. INA Section 237(a)(5) – any alien who, within five years after the date of entry, has become a public charge from causes not affirmatively shown to have arisen since entry is deportable

II. Public Charge

A. Neither the INA nor the regulations define a "public charge" for either the inadmissibility or deportability ground

1. DOS and USCIS have issued policy guidance defining public charge as an individual likely to become or who has become "primarily dependent on the government for subsistence, as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense." – 9 FAM 302.8-2(B)(1)(a) (revised March 12, 2018); USCIS Public Charge Fact Sheet; Pearson Memo, *infra*

B. Determining a public charge – Inadmissibility ground

1. "Totality of the circumstances" test – *Matter of Harutunian*, 14 I&N Dec. 583 (BIA 1974)
    a) The Board notes that broader test applies for inadmissibility, as opposed to deportability, because inadmissibility is forward-looking and deportation "dislodges an established residence" in the US
2. Factors to consider: alien's age; health; family status; assets, resources, and financial status; education and skills
3. Affidavit of support should also be considered
    a) Certain family-sponsored and employment-based immigrants are inadmissible if they do not submit an affidavit of support

C. Determining a public charge – deportability ground

1. *Matter of B-*, 3 I&N Dec. 323 (BIA and AG 1948,) 3-part test

a) The state or governing body must, by appropriate law, impose a charge for the services rendered to the alien
    1) If there is no reimbursement requirement, the person cannot be a public charge
b) The authorities must make a demand for payment of the charges upon those persons made liable under state law
    1) Unless alien and persons legally responsible for his or her care and maintenance are known to be destitute
c) There must be a failure to pay for the charges

2. Within 5 Years
    a) Case law interprets entry as date of last entry into the US – *see, e.g.*, *Matter of B-*, 3 I&N Dec 323, 324 (BIA and A.G. 1948)
    b) An alien cannot become a public charge until a demand for payment is made, and the demand for repayment must be within the 5 years. *Matter of L*, 6 I&N Dec. 349, 352 (BIA 1954)
3. From a condition not arising after entry
    a) Alien has the burden of proving that the disease/condition "did not antedate his landing in the US." *Matter of W-*, 8 I&N Dec. 630, 631. (BIA 1960). *See also Canciamilla v. Haff*, 64 F.2d 875 (9th Cir. 1933); *Ex parte Wong Nung*, 30 F.2d 766 (9th Cir. 1929); *United States ex rel. Casimano v. Commissioner of Immigration*, 15 F.2d 555 (2d Cir. 1926)

III. Affidavits of Support – INA 213; INA 213A; 8 C.F.R. 213a

A. Aliens are required to submit an Affidavit of Support (Form I-864) in order to show that they are not inadmissible under section 212(a)(4)
    1. Immediate relatives (including orphans and K nonimmigrants seeking AOS) seeking admission as LPR or AOS
    2. Family-sponsored immigrants seeking admission or AOS
    3. Employment-based immigrants
        a) If visa petition was filed by a relative (or by an entity in which the relative has 5% or more ownership interest), relative must file an affidavit of support
            1) Relative –spouse, parent, child, sibling
            2) Applies only if relative is USC or LPR
                i. If relative is a sibling, only have to file affidavit of support if USC
        b) Other employment-based immigrants do not require an affidavit of support to prove they are admissible
    4. An accompanying or following to join family member must submit affidavit of support if principal beneficiary was required to
B. Affidavit of Support is not required if
    1. Must file I-864W Exemption form
        a) Alien or alien's parent (while alien was minor) worked 40 qualifying quarters as defined in SSA

b) Immediate relatives entitled to automatic citizenship upon admission
    1) Child (biological or adopted) of USC, if child admitted prior to age 18
    2) Orphan adopted abroad by USC such that he or she would attain citizenship upon entry
        i. Affidavit of support still required for alien orphan if USC parent will not adopt child until child is in the US as LPR or if neither parent saw the child before or during adoption process
c) Self-petitioners
    1) Battered spouses/children of USCs or LPRs
    2) Widows/widowers

2. Child born subsequent to the issuance of an immigrant visa to his or her accompanying parent or child born to LPR mother during temporary visit abroad – 8 C.F.R. 213a.2(a)(2)(ii)
3. Diversity immigrants – 9 FAM 302.8-2(C)(1)(b)(3)
4. Nonimmigrants – including K visa (fiancé visa)
    a) Must still show they will not be a public charge, but as FAM notes, evidence establishing that alien is entitled to a nonimmigrant status classification is generally sufficient to meet the requirements to show will not be public charge, absent special circumstances

C. I-864 Affidavit of Support requirements
1. Requirements to be a sponsor
    a) USC or LPR
    b) 18+
    c) Domiciled in US
    d) Filed visa petition for alien (or relative and employment visa)
        1) Substitute-sponsors – if petitioner has died after petition was approved (and DHS didn't revoke) or alien seeking AOS as surviving relative under 204(L), sponsor can be anyone who meets other requirements and is a spouse, parent, in-law(parent, child, sibling), sibling, child over 18, grandparent, or grandchild of alien
    e) Demonstrates the means to maintain an annual income equal to at least 125% of poverty line
        1) Active duty military petitioning for spouse or child must only show 100% of poverty line
2. Sponsor agrees to maintain alien above 125% of Federal poverty line during period in which affidavit is enforceable
    a) Until alien naturalizes, OR
    b) Until alien has worked/can be credited with 40 qualifying quarters under SSA and didn't received any federal means-tested public benefits
3. If sponsor cannot meet income requirements, co-sponsors allowed

4. Affidavit is legally enforceable as a contract against sponsor by the alien or by any entity that provides any means-tested public benefit

D. Aliens not required to file an I-864, but who are inadmissible under section 212(a)(4) may post bond or submit I-134 Affidavit of support – INA 213
    1. I-134 is not legally enforceable and entitled to less weight than I-864

IV. Aliens excluded from public charge inadmissibility ground

A. Refugees and asylees (initial admission and adjustment of status) – Sections 208, 209(c)
B. Cuban Adjustment - *Matter of Mesa*, 12 I. & N. Dec. 432, 437 (Dep. Assoc. Comm'r 1967)
C. NACARA - 8 C.F.R. 1240.66
D. TPS – 8 C.F.R. 244.3(a)
E. Some categories of special immigrants, including SIJ – section 245(h)
F. U visa nonimmigrants and adjustment – Section 212(a)(4)(E), 245(m)
G. T visa nonimmigrants – section 212(d)(13)
    1. T visa adjustment – public charge ground can be waived – section 245(l)(2)

V. Receipt of public benefits

A. In response to questions raised after the passage of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) regarding the effect of receipt of public benefits by an alien on the public charge determination, the INS proposed regulations in 1999. However, these regulations were never finalized
B. However, at the same time as the proposed regulations, the INS issued a field guide on inadmissibility and deportability on public grounds
    1. Referred to as the "Pearson memorandum" - Dep't of Justice, Immigration & Naturalization Serv., Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28689 (May 26, 1999)
C. While receipt of public benefits in the past can be considered in the 212(a)(4) public charge determination, it is not dispositive. *Matter of Perez*, 15 I&N Dec. 136, 137 (BIA 1974)
    1. *Matter of A-*, 19 I&N Dec. 867 (BIA 1988) (holding that alien was not likely to be a public charge although family had received public cash assistance for nearly four years, because alien was young, had no physical or mental defect that might affect her earning capacity, and had recently begun working)
    2. *Matter of Harutunian*, 14 I&N Dec 583 (Comm. 1974) (holding that an applicant who is 70 yrs old, lacks means of supporting herself, has no one responsible for her support, and who expects to be dependent for support on old-age assistance is ineligible for a visa under public charge excludability ground even though the state from which she will receive old-age assistance does not permit reimbursement)
    3. *Matter of Martinez-Lopez*, 10 I&N Dec. 409, 421-22 (BIA 1962, A.G. 1964) ("The general tenor of the holdings is that the statute [section 212(a)(15) of the Act] requires more than a showing of a possibility that the alien will require public support. Some specific circumstance, such as mental or physical disability,

advanced age, or other fact reasonably tending to show that the burden of supporting the alien is likely to be cast on the public, must be present. A healthy person in the prime of life cannot ordinarily be considered likely to become a public charge, especially where he has friends or relatives in the United States who have indicated their ability and willingness to come to his assistance in case of emergency")

D. DOS guidance includes a list of public benefits that are not considered public cash benefits for the purposes of the public charge inadmissibility ground. 9 FAM 302.8-2(B)(1)
    1. Forms of public assistance that are of a non-cash and/or supplemental nature "should not be considered to be benefits"
    2. But non-cash benefits "may only be considered as part of the totality of the applicant's circumstances in determining whether an applicant is likely to become a public charge." 9 FAM 302.8-2(B)(1)